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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 362

NICK MASICH,

Appellant,

vs.

UNITED STATES SMELTING, REFINING & MINING COMPANY and P. S. MULOCK

APPEAL FROM THE SUPREME COURT OF UTAH.

PETITION FOR REHEARING.

CLARENCE M. KING,
WILLIAM A. HYDE,
REED HARRIS,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

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No. 362

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UNITED STATES SMELTING, REFINING & MINING COMPANY AND F. S. MULOCK,

Appellees

PETITION FOR REHEARING

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

Comes now the appellant in the above entitled cause and respectfully requests this Honorable Court to vacate its order dismissing the appeal in this cause and grant appellant herein a rehearing herein.

Prior to the dismissal of the appeal herein the following proceedings were had:

An action was commenced in the Third Judicial District Court of Utah to secure a construction of the Utah Occupational Disease Disability Law. Utah Code Annotated, 1943, Title 42, Chapter 1a. The proceeding was brought and prosecuted pursuant to Title 104, Chapter 64, Utah Code

Annotated, 1943, which provides for Declaratory Judgments.

The trial court held that the plaintiff was without remedy for the redress of the wrongs complained of.

An appeal was taken to the Supreme Court of Utah, which court in its majority opinion affirmed the judgment of the trial court.

In both the trial court and in the Supreme Court of Utah counsel for the plaintiff argued generally that if the Utah Occupational Disease Disability Law should be construed so as to deprive an employee who was injured because of the negligence of the employer, such law when so construed would offend against the State and Federal Constitution.

After the Supreme Court of Utah rendered its decision construing the Occupational Disease Disability Law to mean that an employee, who contracted an occupational disease on account of the negligence of the employer, is wholly without remedy unless he is rendered totally disabled so that he could not do anything for a profit, the petitioner herein filed his petition with the Supreme Court of Utah for a rehearing. In such petition for a rehearing it was alleged:

> "Comes now the plaintiff in the above entitled cause and moves this Honorable Court to grant a rehearing; that the construction that should be given the Workmen's Occupational Disease Act of Utah be re-examined to the end that such Act be so construed as to do justice to both employer and employee and so that the same will not conflict with Article 4, Section 2 or with the 5th and 14th Amendments of the Constitution of the United States or with Sections 7, 11 and 24 of Article 1 of the Constitution of Utah, and if the Act may not be so construed that it be declared unconstitutional because it offends against and is in conflict with Article 4, Section 2 and with the 5th and 14th Amendments of the Constitution of the United States and with Sections 7, 11 and 24 of Article 1 of the Constitution of the State of Utah.

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"The basis upon which this petition for a rehearing is bottomed is upon the claim that in the majority opinion the court erred in the following particulars:

1. This court erred by in effect concluding that the opinion of the Supreme Court of the United States in the case of New York Central R. R. Co. *v.* White, 243 U. S. 188; 37 S. Ct. 247 holds that a Workmen's Compensation Act comparable with the Act here brought in question to be constitutional.

2. That if the Utah Occupational Disease Act means what the court has construed it to mean then and in such case the Act is in conflict with the provisions of Article 4, Sec. 2 and of the 5th and 14th Amendments of the Constitution of the United States and with Sections 7, 11 and 24 of the Constitution of the State of Utah.

3. The court erred in the majority opinion in holding that if an injured employee has a common law remedy for partial disability such employee would have two causes of action for one wrong in that the Occupational Disease Act gives an injured employee a right to compensation if and when he suffers total disability.

4. The court erred in holding that the kind of affliction with which the plaintiff is afflicted is silicosis within the meaning of the Act and hence covered by the Act.

5. The court erred in holding that under its police powers the legislature has the power to enact a law such as the Occupational Disease Act, if and when such Act is given the construction which is given to it by the majority opinion of the court.

6. That the court erred in the majority opinion in that it cannot be determined from such opinion whether the Act covers the entire field of diseases or injuries to health which results from and are contracted in the course of employment or only such diseases or injuries to health as are enumerated in the Act.

7. The court erred in construing the Act in the manner it was construed because any other construction would render the Act difficult of administration."

In its printed brief the appellant argued that the Act offended against both the State and Federal Constitutional provisions mentioned in the petition for a rehearing and urged the court to pass upon the question of whether the Act when construed as it was construed did not offend against the constitutional provisions set out in the petition for a rehearing. That brief concluded as follows:

> "However, we do most strongly urge this court to re-examine the question as to whether or not the construction placed on the Act by the majority opinion does not render the Act unconstitutional, and particularly when viewed in the light of the provisions of the Constitution of the United States to which reference is made in the petition for a rehearing.
>
> The effect of the construction placed on the Act is of such far reaching effect and so vital to the interests of the plaintiff and all others similarly situated that we would be derelict in our duty to our client if we should fail to attempt to secure a decision as to the constitutionality of the Act by the final arbiter of such questions.
>
> In order to accomplish that purpose it is necessary that this court first decide such questions and in order to avoid the necessity of again presenting such question in another proceeding we most earnestly and respectfully urge this court to re-examine the matter of whether or not the Act as heretofore construed by this court offends against the constitutional provisions mentioned to the end that a final decision may be secured touching the constitutionality of the Act."

The petition for a rehearing was by the Supreme Court of Utah denied, without opinion. A short time after the petition for a rehearing was denied one of counsel for the petitioner herein inquired of the Justice of the Supreme

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Court of Utah who had written the prevailing opinion in this cause if the court would not render a written opinion disposing of the Federal Constitutional questions presented by the petition for a rehearing and was informed by such justice that the court had considered and passed upon such questions and had concluded that the Occupational Disease Disability Law did not offend against the Federal Constitutional provisions relied upon by the petitioner in his petition for a rehearing.

Thereupon the petitioner herein prosecuted an appeal to this Court and filed herein such documents as were deemed necessary to perfect such appeal. After the above entitled cause was docketed in this Court the appellees filed their motion to dismiss the appeal. Very soon after the motion to dismiss the appeal in this cause was filed in this Court one of counsel for appellants herein requested the chief justice of the Supreme Court of Utah to furnish to counsel for petitioner herein a certificate showing that the Federal Constitutional questions specifically mentioned in the petition for a rehearing had been considered and passed upon by the Supreme Court of Utah. The chief justice of the Supreme Court of Utah stated that as soon as he could secure the attendance of all the justices of that court he would take the matter up with the other members of the court. After the lapse of a number of days the chief justice of the State of Utah gave counsel for the petitioner the certificate requested, which certificate reads as follows:

> "I, Rodger I. McDonough, Chief Justice of the Supreme Court of the State of Utah, hereby certify:
>
> That in the above entitled cause, the question whether the "Utah Occupational Disease Disability Law" Chapter 1a, Title 42, Utah Code Annotated, as amended 1945, and its applications in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no

state shall deprive any person of life, liberty, or property without due process of law, and also repugnant to Article Four Section Two of the Constitution of the United States and the Fifth Amendment to the Constitution of the United States, was considered and passed upon by this court.

By the Court (S.) RODGER I. MCDONOUGH,
Chief Justice.

Dated this 10 day of November, 1948.
Attest:
By (S.) L. M. CUMMINGS,
Clerk."

The certificate was given one of counsel for the petitioner herein at about 5:00 o'clock P. M. on November 10, 1948, the day following November 11th was a holiday and on November 12, 1948 a service of a copy was had upon counsel for the appellees and on the same day, November 12, 1948, the said certificate was sent by airmail to the clerk of this Court. Your petitioner is informed by the clerk of this Court that the certificate was not received by him until November 15, 1948, after this Honorable Court had granted the motion to dimiss the appeal in this cause.

In support of this petition for a rehearing your petitioner refers to and makes a part hereof the records and files herein an affidavit which is hereunto attached, marked Exhibit "A" and made a part hereof.

The following cases are believed to support petitioner's claim that the certificate of the chief justice of the Supreme Court of Utah is proper matter to consider by this Court in passing upon this petition:

In the case of *Thomas Armstrong, et al.*, v. *The Treasurer of Athens County,* 16 Peters 281, 10 L. Ed. 965, it is said:

> "In the case now before us, the presiding judge of the Supreme Court of Ohio has certified on the record that the validity of a statute of the State was drawn in

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question, on the ground that it was repugnant to the Constitution of the United States, and that the decision was in favor of the validity of said statute; and this certificate of the judge is certified by the clerk, as a part of the record. We presume that the certificate of the presiding judge was made by the authority of the court; and as this bill and answer show that such a point might have arisen, and this certificate on the record states that it did arise, and was decided, the case comes within the fourth clause above mentioned, and this court must take jurisdiction, and examine whether the point so certified was rightfully decided."

In the case of *Cincinnati, P. B. S. & P. Packet Co.* v. *Bay*, 50 L. Ed. 428, it is said:

"No opinion was delivered, but a certificate that this objection was relied upon, and that it necessarily was considered, was made a part of the record by that court. Therefore the present writ of error properly was allowed. The record shows that the question was raised, and the certificate shows that it was not treated as having been raised too late under the local procedure,—a point upon which the state court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest court of the state." (Mr. Justice Holmes)

In the case of *Major Raymond Lisenba* v. *The People of the State of California*, 314 U. S. 219-243, 86 L. Ed. 166, it is said:

"Rehearing was granted in the California Supreme Court, the decision reaffirmed the former decision. In a second petition for a rehearing, for the first time, petitioner raised a Federal Constitutional question. On November 3rd 1939, the state court ruled 'the petition for a rehearing herein is denied'.

The chief justice of the state allowed an appeal and executed a certificate in which it was stated, certain Federal questions were raised by the second petition

for rehearing, and that the court overruled such contentions. On the record so made this court held, that it had jurisdiction to review the judgment."

Other cases in point are:

Consolidated Turnpike Co. v. *Norfolk and Ocean View R. R. Co.*, 228 U. S. 596, 33 Sup. Ct. 605, 57 L. Ed. 982;
Victor J. Herb v. *Norman Pitt Cario*, 324 U. S. 117, 65 Sup. Ct. 459, 89 L. Ed. 789.

WHEREFORE, petitioner prays that he be granted a rehearing; that the order dismissing the appeal herein be vacated and that this Honorable Court assume jurisdiction of the above entitled cause to the end that the validity or invalidity of the Occupational Disease Disability Law of Utah here brought in question be determined by this Honorable Court.

Respectfully submitted,

CLARENCE M. BECK,
WILLIAM A. HILTON,
ELIAS HANSEN,
Attorneys for Appellant.

Clarence M. Beck and Elias Hansen, hereby certify that they are two of the attorneys for the appellant in the above entitled cause; that they and each of them further certify that in their opinion there is merit in the foregoing petition for a rehearing and that the same is filed in good faith and not for delay.

CLARENCE M. BECK,
ELIAS HANSEN.

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Appellees

AFFIDAVIT

STATE OF UTAH,
County of Salt Lake, ss:

Clarence M. Beck, being first duly sworn, deposes and says: That he is and at all times herein alleged has been one of the attorneys for the appellant herein; that a short time (the exact time affiant does not now recall), after the petition for a rehearing was denied in the above entitled cause affiant inquired from Justice Latimer (who wrote the prevailing opinion in the above entitled cause) why a written opinion was not rendered disposing of the Federal Constitutional question raised by the petition for a rehearing. That in response to the inquiry Justice Latimer informed affiant that such Federal question had been considered and passed upon by the court and the conclusion

reached that the Occupational Disease Disability Law did not conflict with the provisions of the Federal Constitutional provision mentioned in the petition for a rehearing. Affiant further avers that upon receipt of a copy of the motion to dismiss the appeal of this cause in this Court affiant proceeded to examine the authorities cited in such motion and other authorities touching the question involved. That after making such examination he inquired from the Chief Justice of the Supreme Court of Utah if that court had considered and passed upon the matter of whether or not the Occupational Disease Disability Law of Utah was in conflict with the Federal Constitutional provisions mentioned in petition for a rehearing and if the court had so passed on such matters if the Chief Justice would give a certificate showing the facts. That the said Chief Justice informed affiant that he would take the matter up with the other members of the court when they were available. That after the lapse of a number of days the Chief Justice gave affiant the certificate which is set out in the petition for a rehearing filed herewith and affiant caused the same to be served on appellees' counsel and sent by air mail to the clerk of this Court as alleged in the foregoing petition for rehearing.

CLARENCE M. BECK.

Subscribed and sworn to before me this 24th day of November, 1948.

FLORENCE McDERMOND,
Notary Public,
Residing in Salt Lake City, Utah.

My Commission Expires 7-14-51.

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